

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)

)
Amendment to the Commission's)
Regulatory Policies Governing)
Domestic Fixed Satellites and)
Separate International Satellite)
Systems)

IB Docket No. 95-41

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PETITION FOR RECONSIDERATION

PanAmSat Corporation ("PanAmSat"), by its attorneys and pursuant to Section 1.106 of the Commission's rules, hereby requests that the Commission reconsider, in part, its Report and Order in the above-captioned proceeding (the "DISCO Order").¹

PanAmSat strongly supports the competitive goals underlying the DISCO Order. PanAmSat is concerned, however, that, rather than promoting competition, two aspects of the DISCO Order will impede the full development of a competitive satellite market. Specifically, the requirement that all international FSS applications be considered in processing rounds and the stringent financial qualification standards adopted in the DISCO Order undermine the Commission's objective of ensuring that users of satellite services have access to a broad range of innovative services from a diverse range of providers. Accordingly, PanAmSat urges the Commission to reconsider those aspects of the DISCO Order.

- I. THE COMMISSION SHOULD NOT DELAY APPLICATIONS TO OPERATE INTERNATIONAL SATELLITES BY GROUPING THEM IN PROCESSING ROUNDS.**
- A. The Commission's Decision to Change Its Policy Regarding The Use Of Domestic Processing Rounds For Applications To Operate International Satellites Was Procedurally Defective.**

Agency procedures must comport with the Administrative Procedure Act ("APA"), which requires that agencies include in each notice of proposed rulemaking "either the terms or substance of the proposed rule or a description of

¹ Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems, IB Docket No. 95-41 (rel. Jan. 22, 1996).

the subjects and issues involved.”² The Commission’s decision to promulgate a new rule requiring all future satellite applications to be processed in “consolidated FSS rounds” contravenes this requirement.

In the DISCO NPRM (adopted April 5, 1995), the Commission proposed to eliminate the distinction between the domsat “transborder policy” and separate international satellite system policy.³ As part of those changes, the Commission proposed to adopt a single financial qualification standard for all satellite applicants and to modify some of its earth station licensing procedures. Nowhere in the DISCO NPRM, however, did the Commission indicate that it was considering revisions to its FSS processing policies or that, in particular, it was proposing to license separate system satellites in processing rounds.

Nonetheless, in the DISCO Order, the Commission adopted, in two sentences and without reference to the record of the rulemaking proceeding, a sweeping new rule requiring all future satellite applications to be processed in “consolidated FSS rounds” that would not be opened until the Commission concluded action on “all pending separate system applications and ... the pending domsat processing round.”⁴ The use of domestic processing rounds to process international, separate system applications in uncongested portions of the arc had not been proposed, or even foreshadowed, in the DISCO NPRM and, based upon a review of the record, no party commented on the issue.⁵

Although final agency rules need not be identical to proposed rules, due process and the APA require that they must, at minimum, be a “logical outgrowth” of the proposed rules.⁶ The Commission’s new satellite application processing policy fails this test. “Something is not a logical outgrowth of nothing.”⁷ As noted above, the DISCO NPRM did not contain the terms of the new policy, it did not

² 5 U.S.C. § 553(b)(3).

³ See Amendment to the Commission’s Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems, 10 FCC Rcd 7789, 7792-96 (1996) (the “DISCO NPRM”).

⁴ DISCO Order ¶ 44.

⁵ Even if the issue had been raised in the public comments, that would not have satisfied the Commission’s obligations under the APA. “Ultimately, notice is the agency’s duty because comments by members of the public would not in themselves constitute adequate notice. Under the standards of the APA, notice necessarily must come — if at all — from the Agency.” Horsehead Resource Development Co. v. Browner, 16 F.3d 1246, 1268 (D.C. Cir. 1994) (quotation omitted).

⁶ E.g., Fertilizer Inst. v. EPA, 935 F.2d 1303, 1311 (D.C. Cir. 1991).

⁷ Kooritzky v. Reich, 17 F.3d 1509, 1513 (D.C. Cir. 1994).

propose the abolition of the traditional separate system “case-by-case” processing policy, and it did not mention, let alone come to grips with, the issues raised by requiring separate system applicants to await future processing rounds.

Moreover, just as notice of one element of a rule is not adequate notice of a whole rule,⁸ interrelation between the rule adopted and rules proposed does not satisfy the notice and comment requirements of the APA.⁹ Thus, the fact that satellite application processing is related to financial qualification standards and domestic/international service issues does not save the new policy. There is no reason that any change in these other areas necessarily would imply that applications for space stations in uncongested portions of the arc should be processed in consolidated processing rounds.

Further, the Commission’s own conduct in the months after issuance of the DISCO NPRM refutes the notion that a unified processing policy necessarily followed from the proposed changes in the DISCO NPRM. On two occasions after the DISCO NPRM had been released, the Commission indicated that it contemplated conducting a separate rulemaking proceeding addressed specifically to the satellite licensing issue. On September 20, 1995, the Commission issued a public notice in which it announced that the “International Bureau is initiating a comprehensive review of its satellite licensing policies.”¹⁰ The review was to begin with a “satellite roundtable” on various issues that would “form the basis for a formal rulemaking” in 1996.¹¹

Among the issues raised for the satellite roundtable was: “[S]hould the Commission license satellites in ‘rounds’ (as [it has] for domestic satellites and other services), on a case-by-case basis (as [it has] for separate systems), or through some other method?”¹² On November 21, 1995, the Commission issued a public notice announcing the date of the satellite roundtable and reiterating that the use of “licensing rounds” for satellite application processing would be an issue for discussion and future rulemakings.¹³ Thus, far from providing adequate notice of

⁸ Horsehead Resource Development Co., 16 F.3d at 1267.

⁹ Kooritzky, 17 F.3d at 1514.

¹⁰ Public Notice, “International Bureau to Review Satellite Licensing Policies,” IN-95-25 (Sept. 20, 1995).

¹¹ Id.

¹² Id.

¹³ See Public Notice, “Roundtable Date Set On Satellite Licensing Policies,” SPB-31 (Nov. 21, 1995).

its new satellite application processing policy, the Commission actually indicated that it would not adopt a new processing policy without a separate notice and comment rulemaking proceeding and full public participation.

For the foregoing reasons, the Commission's decision to consider all future applications in the context of processing rounds is procedurally defective.

B. The Record Does Not Support The Use Of Consolidated Processing Rounds For International Applications And There Are Strong Public Policy Reasons For Not Doing So.

In addition to being procedurally defective, applying processing rounds to all satellite applications is contrary to the public interest. While processing rounds have been useful to the Commission when seeking to resolve apparent conflicts among domestic satellite applicants, application of processing rounds to orbital locations to be used for international satellite service is unworkable and, moreover, would place U.S.-licensed international satellite operators at a competitive disadvantage *vis-a-vis* non-U.S.-licensed satellite operators.

1. International Orbital Locations Are Not Fungible Or Controlled By A Single Administrator.

The use of processing rounds for applications to provide domestic satellite service was intended to assist the Commission in determining whether satellite applications are mutually exclusive. The Commission's primary goal was to avoid mutual exclusivity whenever possible, since the only method the FCC had to resolve such conflicts was to set the applications for comparative evidentiary hearing. Such hearings are inherently inconsistent with the fast-paced technology and competition in the satellite industry.

An essential element of the policy of avoiding comparative hearings is the notion that orbital locations within the domestic arc are fungible. This notion is true: As a general matter, an applicant can provide high-quality domestic satellite service from any point in the domestic arc, with the only variant being whether a satellite at a given location is capable of 50-state coverage or only CONUS coverage.

Another essential element of processing domestic satellite applications in processing rounds has been that there is a single administrator — the FCC — who assigns the orbital/spectrum resource at the same time to all current applicants.

There is a single starting gate and a single starter and no domestic applicant need be concerned that a competitor will get a head start.

Neither of these elements is present with respect to international satellite applications. International orbital locations are not fungible, except in very narrow ranges that are not decisionally relevant. International operators operating globally serve land masses that border all the ocean regions of the world. They have widely dispersed service requirements that dramatically reduce the fungibility of orbital locations. Fungibility is further undermined when the need to coordinate with non-U.S. satellite systems is factored into the mix.

It is also plain that there is no single regulatory agency assigning international satellite orbital locations. While the U.S. successfully has “regulated” the orbital locations to be used over North America by reaching bilateral agreements with Canada and Mexico, so that the Commission effectively acts as a single administrator for all orbital locations used to serve the United States, no similar arrangements have been made worldwide. The assignment of international orbital locations is essentially open-ended, with the only mechanism to deal with mutual exclusivity being the ITU’s intersatellite coordination procedures, which are being severely tested at present.

Because international orbital locations are not fungible and because there is no single regulatory agency assigning locations, there can be no single “processing round” for all U.S. and non-U.S. applicants for such locations. Moreover, as discussed below, if the FCC were to subject only U.S. applicants to the delays and uncertainties of processing rounds, it would put U.S.-licensed international satellite operators at a severe competitive disadvantage *vis-a-vis* non-U.S.-licensed operators.

2. U.S. Operators Would Be At A Competitive Disadvantage.

Outside of the domestic arc, the principal source of competition to U.S. satellite operators is satellite systems licensed by foreign administrations. These foreign satellite systems are not subject to licensing requirements comparable to those confronted by U.S. satellite applicants, requirements that often result in licensing delays and the imposition of additional costs associated with constructing, launching and operating a separate system satellite. Processing rounds would impose additional delays on U.S. applicants.

Given the stiff competition for prime international orbital locations, such delays would place U.S. satellite licensees at a significant competitive disadvantage relative to their foreign-licensed competitors. In response, many U.S. licensees would feel compelled to turn to foreign administrations to license their systems. GE Americom already has done so with its application filed with the government of Gibraltar for 12 orbital locations.¹⁴ Others will follow, thereby reducing the ability of the United States to continue to shape the competitive structure of the industry.

To ensure that U.S. applicants are competing on a level playing field, and to maintain the participation of the U.S. government in shaping the regulatory environment for international satellite services, the Commission should reconsider its decision to consider applications for all orbital locations in the context of processing rounds.

II. THE COMMISSION'S FINANCIAL QUALIFICATION STANDARDS SHOULD ENCOURAGE THE ENTRY OF RESPONSIBLE, INNOVATIVE SERVICE PROVIDERS.

The DISCO Order extends the domestic one-step financial showing standard to all satellite applicants.¹⁵ The Commission provided, however, that applicants for orbital locations in uncongested portions of the arc may make a "two-step" financial showing, upon special waiver request, if they provide detailed system cost information, a description of the efforts that the applicant has made to obtain financing, and a showing that application of the two-step process will "not foster the misuse of scarce orbital resources, and that the public interest would ... not be served by the application of [the] one-step rule."¹⁶

PanAmSat supports the two-step financial showing articulated in the DISCO Order, provided that such a showing is applied flexibly. By coupling the traditional separate system financial qualification standard with a public interest showing, the Commission has balanced the need to prevent warehousing of scarce orbital locations against the important objective of ensuring that a broad range of competitors are able to enter the market.

That said, the Commission's decision to retain the one-step showing for "congested" portions of the arc undermines this objective. The DISCO Order states

¹⁴ See Communications Daily (Jan. 12, 1996) at 3-4; Communications Daily (Jan. 19, 1996) at 3-4.

¹⁵ DISCO Order at ¶ 41.

¹⁶ Id. at ¶ 42.

that the Commission's "primary obligation is to ensure that the U.S. public has available to it the widest range of satellite service offerings from the greatest number of competitors possible."¹⁷ As the existing domestic satellite market illustrates, however, application of the stringent domestic financial standard inhibits the competitive entry of new, innovative satellite operators and, in turn, prevents users of satellite services from having access to a diversity of service providers.

If the Commission's "primary obligation" is to be satisfied, the applicable financial qualification standards must not limit market entry only to the largest industrial concerns. In this regard, PanAmSat urges the Commission to apply its newly articulated two-step approach to applications for all orbital locations, not just locations in the less congested international arc. To prevent warehousing of scarce orbital resources, the Commission should apply and strictly enforce — in addition to the new two-step showing — ambitious but realistic satellite construction and operational milestone. Such an approach will prevent warehousing and allow the Commission to fulfill its "primary obligation" of ensuring that the U.S. public has access to a wide-range of satellite services from a diverse range of service providers.

CONCLUSION

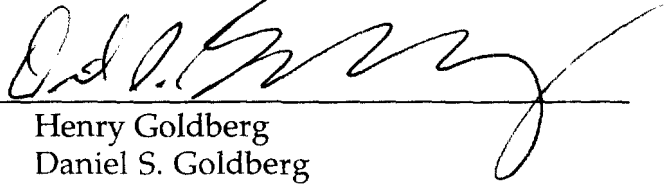
In view of the foregoing, PanAmSat urges the Commission to reconsider those portions of the DISCO Order related to the adoption of processing rounds for international FSS applications and the applicable financial qualification standards. Reconsideration of the DISCO Order, consistent with this Petition, will ensure that

¹⁷ Id. at ¶ 40.

the Commission meets its "primary obligation": ensuring that the public has access to a broad range of satellite services from a diverse range of service providers.

Respectfully submitted,

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